



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of Jerry Wojtkiewicz, d/b/a Shady
Rest Campground for Placement of Piers on the
Bed of Bear Lake, Township of Bear Lake, Barron
County, Wisconsin

Case No. 3-NO-00-03155

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Jerry Wojtkiewicz, d/b/a Shady Rest Campground, 1386 24 ½ Street, Cameron, Wisconsin 54822, applied to the Department of Natural Resources for a permit under Wis. Stat. § 30.12, to place piers on the bed of Bear Lake, Town of Bear Lake, Barron County, Wisconsin.

A notice was published which stated that unless written objection was received within 30 days the Department might make a decision on the application without a hearing. Several timely objections were filed.

Pursuant to due notice hearing was held on October 29-30, 2001, Jeffrey D. Boldt, administrative law judge, presiding. The parties requested an opportunity to submit written closing arguments and the last submittal was received on December 3, 2001.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

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FINDINGS OF FACT

1. Mr. Jerry Wojtkiewicz, d/b/a Shady Rest Campground, 1386 24 ½ Street, Cameron, Wisconsin 54822, completed filing an application with the Department of Natural Resources for a permit under Wis. Stat. § 30.12, to place piers on the bed of Bear Lake, Town of

Bear Lake, Barron County, Wisconsin. The Department and the applicant have fulfilled all procedural requirements of Wis. Stat. §§ 30.12 and 30.02.

2. The applicant owns real property located in the SE ¼ of the NE ¼ in Section 12, Township 36 North, Range 12 West, Town of Bear Lake, Barron County. The above-described property abuts Bear Lake, which is navigable in fact at the project site.

3. The applicant proposes to construct seven piers accommodating up to 42 boat slips. The proposed seven piers vary in length. There would be two 40-foot long piers; two 64-foot long piers with three 16-foot finger piers; two 72-foot long piers, one with eight 16-foot fingers and the other with six; and one 80-foot long pier with eight 16-foot fingers.

4. The purpose is the mooring of boats for use by campground users. The campground has been located at the site for many years. (See: Finding 8) The campground serves up to 79 campers, most of who come to make use of Bear Lake. Numerous campers testified that there are not enough slips to meet demand, especially on busy weekends. There was no dispute in the record that campgrounds providing lake access are rare, given the high values of lakefront property. Many such campgrounds have been converted to upscale individual properties.

5. The Shady Rest Campground property is located in a narrow bay area of Bear Lake. Immediately east of the campground is an extensive area of emergent vegetation, including white and yellow water lilies, coontail, and wild celery. Numerous citizen witnesses described the extensive use of the bay located west and north of this emergent vegetation for fishing, bird watching, cruising, paddle sports, tow sports and other navigational uses. (Fell, Meier, Schieffer, Kasmarek, Juza, Herbert)

6. The proposed piers would materially obstruct navigation in the bay. DNR Warden Russell Fell expressed concern that any piers greater than 50 feet long would materially obstruct navigation on this part of Bear Lake. Warden Fell testified that he believed the proposal would result in dangerous congestion in the narrow bay and conflicts between campers moored at the piers and others navigating in the bay. At some points, the bay is only 132 feet wide. (Fell) This testimony was confirmed by long time Bear Lake user, Tom Juza. Both Warden Fell and Mr. Juza testified that a maximum pier length of 50 feet would be reasonable at the proposed site.

7. A riparian's use of a property must be reasonable and proportionate to the amount of shoreline owned. (Ex. 34) The record is unclear as to exactly how much riparian frontage is owned by the campground. The applicant did not undertake an exact measurement of the shoreline. If the property represents an entire quarter section, the frontage would be approximately 1320 feet. (Hack) However, the Association produced a Barron County Tax List Map that strongly suggested the parcel contains less than 1320 feet of riparian frontage. (Ex. 36) Based upon this map, DNR Water Management Specialist Dan Harrington estimated the riparian frontage to be 950 feet. There is no dispute that the parcel includes somewhere between 950 (Harrington) and 1,350 (Hack) lineal feet of riparian frontage.

The DNR has prepared a Guidance Document for use by field staff to analyze the “reasonable” use of riparian property. (Ex. 34) As a starting point, the Department has provided a threshold calculation allowing for two berths in the first 50 feet of frontage and one for each additional 50 feet of shoreline in common ownership. The number of berths resulting from this analysis may be more or less than the reasonable use, depending on site characteristics and other factors, including the provision of access to the general public. Two key elements of the reasonable use determination are the “sensitive resources, which limit use of the shoreline” and “amount of shoreline frontage owned.” (Id.) The threshold number of slips for 1350 feet would be 28, for 950 feet it would be 20. (Harrington) Given the lack of definitive proof, a threshold calculation of 24 would best represent the record developed at hearing. This also corresponds with the historic use of the property as described below.

8. The historic use of the site has been as a campground. Shady Rest Campground has been in operation for over 30 years. Up to 10 piers, mooring 20 to 26 boats have been placed at the site. There was testimony from two individuals who assisted in erecting the piers at the Shady Rest shoreline. Randy Mancl (Mancl), the former owners’ grandson, was at the campground for extended periods in the summer from 1980 to approximately 1990. Mancl recalled that there were eight or more small piers less than 16 feet long at various times along the main portion of the shoreline, plus two piers in the artificial channel at the south end of the campground facility. At least six of these piers along the shoreline are visible from the aerial photographs from 1980 and 1998, Exhibit 16 and 1 respectively. Ray Torgrimson (Torgrimson), a long time camper at the facility, assisted in the placement of piers after Mr. Mancl’s time. Torgrimson recalled that there were approximately ten piers that he helped place along the shoreline. Both Mr. Mancl and Mr. Torgrimson indicated there were often ten boats placed on shore between piers. The pattern of historic use has involved placement of eight to ten small piers (less than 16 feet in length) and mooring 16 to 20 boats. Further, an additional five to ten boats have often been placed along the shoreline. The “historic use” of the parcel has involved mooring of 20 to 25 boats. It should be noted that this is substantially less than the 40 boats which the applicant described to the DNR.

9. A substantial portion of the parcel owned by the applicant consists of wetlands. There was no testimony that any filling of wetlands would occur as a result of the proposed pier project. The parking area for the piers already exists on an upland portion of the parcel. To protect the present and future values of wetlands at the site, the permit includes a provision that the Department of Natural Resources should modify or revoke the structures permit should any significant detrimental secondary impacts on wetlands occur as a result of placement of the piers.

10. Bear Lake supports a diverse fishery, which includes northern pike, large and smallmouth bass, walleye, ciscoes and numerous panfish. The project is located immediately adjacent to an aquatic plant community designated as a “sensitive area.” This area provides significant fish and wildlife habitat. DNR Fish Biologist Rick Cornelius testified that the Department opposed placement of any piers in the sensitive area. Both Mr. Cornelius and the applicant’s expert, Mr. Hack, acknowledged there might be some limited local impact from pier F, although both believed these impacts would be minimal. Retired Wisconsin DNR employee George King, a former Fish Management Supervisor, opined that the placement of large pier structures often has a detrimental impact upon fish habitat. Further, King testified that he was

concerned that pier “F”, the pier closest to the sensitive area of emergent aquatic vegetation, would result in detrimental impacts to fish habitat as a result of large boats turning to gain ingress and egress to the lake.

11. The proposed project area provides some wildlife habitat as well. Numerous birds, including eagles, Great Blue Heron, mallards and loons make use of the area. (Ex. 23) The DNR also observed numerous furbearers, including muskrat, fisher and beaver, as well as white-tailed deer. There was a substantial expert testimony that the proposed project would not have a detrimental impact upon wildlife habitat. (Harrington, Hack, Morgan)

12. The proposed project would have a detrimental impact upon natural scenic beauty in the area. As noted, many people enjoy the natural beauty of the bay and of the stand of emergent aquatic vegetation just south of the proposed area. Reduction of the scope of the project from seven longer piers to five piers less than 50 feet in length, and from 42 to 29 boats, will reduce impacts to natural scenic beauty to be consistent with the public trust.

13. The applicant is financially capable of constructing, maintaining, monitoring or removing the structures if they should be found in the public interest to do so.

14. The proposed structures will not reduce the effective flood flow capacity of Bear Lake upon compliance with the conditions in the permit.

15. The proposed structures would materially obstruct existing navigation on Bear Lake and would be detrimental to the public interest. However, as modified in the permit set forth below, placement of a reduced number of piers will meet the requirements, of Wis. Stat. § 30.12. The conditions set forth below are reasonable and necessary to protect the public interest and to prevent a material obstruction of navigation on Bear Lake.

16. The proposed structures will not adversely affect water quality nor will they increase water pollution in Bear Lake. Any increase in fuel spills or other direct pollutants entering the bay as a result of the project will have no detrimental impacts on water quality. (Harrington) The structures will not cause environmental pollution as defined in Wis. Stat. § 281.01(10), if the structures are built and maintained in accordance with this permit.

17. The Department of Natural Resources has complied with the procedural requirements of Wis. Stat. § 1.11, and Wis. Admin. Code ch. NR 150, regarding assessment of environmental impact.

DISCUSSION

Perhaps recognizing the DNR’s concerns about piers greater than 50 feet obstructing navigation, the applicant submitted a revised proposal with his written closing argument. That plan reduced the number of slips from 42 to 36; it also reduced the size of the piers to meet concerns about the piers materially obstructing navigation. It should be noted that the applicant

stated that pier sections available to him come in standard eight-foot sections. The revised proposal is accepted with three modifications.

First, the pier closest to the emergent aquatic vegetation south of the campground, identified as pier “F” on the plan, shall not be placed. Pier F has been eliminated due to the concerns about pontoon boats attempting to navigate so close to the aquatic vegetation. (See: Finding #10) Elimination of pier “F” is necessary to protect the “sensitive area” of emergent aquatic vegetation.

Second, the two piers on the north property line which is near the mouth of the bay, identified as piers “A”, “B” and pier “E”, the closest remaining pier to the sensitive area, shall be reduced in length from 56 feet to 48 feet. This will further reduce the likelihood of the navigational problems which Warden Fell identified. (See: Finding #6) Based upon the record at hearing, any piers greater than 50 feet in length would materially obstruct navigation.

Third, no boat shall be moored on the outside of pier “E”. This modification is made to reduce the area of impact of pier E in the navigational channel of the bay. The latest proposal does not involve mooring any boats on the southern side of pier “E”, which is the side closest to the sensitive area of emergent aquatic vegetation. This layout shall be followed. (See: Permit, Attachment A) Further, because of the concentration of boats in the area, the permit includes a condition prohibiting the storage or placement of boats along the shoreline during boating season as has been the practice in years past. (See Finding #8)

Professor Mofle asserts in his brief that the concept of “historic use” seemed “to be generated spontaneously and specifically for this permit application.” This is not the case. The concept of the “reasonable use” of riparian property dates back to at least 1871, and the case of *Timm v. Bear*, 29 Wis. 254, 265 (1871). In that case the Wisconsin Supreme Court set forth factors to be considered in reaching a case-by-case determination of “reasonable use.” These included, “the subject matter of the use, the occasion and manner of its application, its object, extent and the necessity for it, to *the previous usage*, and to the nature and conditions of the improvements. . . .” (Id., p. 265) The Department properly considered historic usage of the property in connection with the permit application. It is unfortunate that the applicant submitted an exaggerated estimate of “historic use” to the DNR. “Historic use” is just one factor in the balancing test to determine “reasonable use.” The permit as issued reflects a balancing of the public rights in public waters and the applicant’s right to “reasonable use” of his riparian frontage.

Similarly, Professor Mofle continues to object to the fact that written objections entered before the hearing were not considered at the time of the contested case. However, to do so would violate the “fair-play” provisions of Chapter 227, which provide all parties the right to cross-examination of witnesses. See: § 227.45(6) The “substantive written objections” submitted provided a basis for a hearing in this matter. There was ample public participation during the course of the two-day public hearing. Professor Mofle’s own participation was substantial and valuable. The list of parties indicates that public participation was extensive.

Finally, the Bear Lake Association argues that the number of slips permitted should be substantially less than the “threshold” determination under the guidance document because a large portion of the parcel consists of wetlands. However, unlike the *Anderson* case cited by the Association, there was no expert testimony that there were likely to be detrimental impacts on wetland functional values as a result of placement of the piers. (Citing, *Application of Don Anderson for a Permit to Place a Structure (88 Slip Marina) on the Bed of Lake Wisconsin, Town of Lodi, Columbia County, Wisconsin* - Case No. 3-SE-99-4013LW) Further, a parking area for the campground already exists. To protect the present and future values of wetlands, a condition has been added to the permit giving the DNR the right to modify or revoke the permit if there are significant adverse impacts to the wetlands as a result of the pier structures.

Accordingly, the final permit requires that no more than 29 boats be moored at the site. This is slightly more than the “previous usage”, and reflects the fact that public access to the lake through campground piers provides a public benefit not readily available. Further, the applicant has agreed to a condition reserving three boat slips to members of the public other than campers at Shady Rest Campground.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 30.12 and 227.43(1)(b), and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structures subject to the conditions specified.
2. The applicant is a riparian owner within the meaning of Wis. Stat. § 30.12.
3. The proposed facilities described in the Findings of Fact constitute structures within the meaning of Wis. Stat. § 30.12.
4. The applicant is a riparian owner within the meaning of Wis. Stat. § 30.12. The applicant has not carried his burden of proving the exact amount of riparian frontage owned.
5. The applicant for a Wis. Stat. § ch. 30 permit has the burden of proof that the project will meet the standards in Wis. Stat. § 30.12(2), *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987). The applicant has not carried his burden of showing that the proposed project would not be detrimental to the public interest in navigable waters. However, as modified, and subject to the conditions set forth below, the project will not be “detrimental to the public interest.”
6. The placement of seven large piers totaling 42 boat slips in this area would not be a “reasonable use” of this wetland-dominated riparian parcel. See: *Sterlingworth v. DNR*, 205 Wis. 2d 710, 556 N.W.2d 791 (Wis. Ct. App. 1996) Placement of five piers less than 48 feet in total length and mooring no more than 29 boats would be the maximum “reasonable use” of this riparian property.

7. The DNR and the Division must consider the cumulative impacts of permitting structures under Wis. Stat. § ch. 30. *Hixon v. Public Service Commission*, 22 Wis. 2d 608, 619, 146 N.W.2d 577 (1966) and *Sterlingworth v. DNR*, 205 Wis. 2d 710, 556 N.W.2d 791, (Wis. Ct. App. 1996) There would be detrimental cumulative impacts from placing numerous piers in areas which provide significant aquatic habitat. However, there are few remaining campgrounds which provide seasonal mooring of boats on Bear Lake. The reduction of the total number of boats to 29 reflects a consideration of the cumulative impacts of similar proposals.

8. The public trust doctrine protects the public interest in navigable waters, including the interest in maintaining a high-quality fishery for recreational purposes. *Muench v. PSC*, 261 Wis. 492, 501-502, 53 N.W.2d 514 (1952). The public trust duty requires the state not only to promote navigation but also to protect and preserve its waters for fishing, recreation and scenic beauty. *Just v. Marinette Co.*, 56 Wis. 2d 7 (1972) Elimination of proposed pier “F” is necessary to protect and preserve fish habitat on Bear Lake.

9. The project is a type III action under Wis. Admin. Code § NR 150.03(8)(f)4. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, a permit under Wis. Stat. § 30.12, for the construction of structures as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structures become a material obstruction to navigation or become detrimental to the public interest.

2. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.

3. A copy of this permit shall be kept at the site at all times during the construction of the structures.

4. The permit granted herein shall expire three years from the date of this decision, if the structures are not completed before then.

5. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.

6. The permittee shall notify the local Water Management Specialist, not less than 5 working days before starting construction and again not more than 5 days after the project has been completed.

7. Any area disturbed during construction shall be seeded and mulched or riprapped as appropriate to prevent erosion and siltation.

8. No heavy equipment shall be operated in the Lake at any time unless written notification is made to the local Water Management Specialist, at least 5 working days in advance.

9. The piers shall be limited to 48 feet in length. No more than 29 boats shall be moored at the site. The applicant shall make three slips available for use by members of the public other than campers at Shady Rest Campground.

10. Placement shall be as described in Attachment A, as modified above.

11. Boats shall not be placed or stored along the shoreline during boating season except as needed in an emergency.

12. The permit shall be modified or revoked if placement of the structures is shown to have detrimental direct or secondary impacts on wetland functional values.

13. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on December 21, 2001.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.